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No. 94-654

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

LORI BOYAR REALBUTO,

Petitioner,

v.

ELIN M. HOWE, individually and as Commissioner of the New York State Office of Mental Retardation and Developmental Disability; EDWARD V. REGAN, individually, and as Director of the New York State Department of Audit and Control; JOSEPHINE GAMBINO, individually, and as Commissioner of the New York State Department of Civil Service; and THE STATE OF NEW YORK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The respondents argue in their Brief in Opposition that the decisions below do "not conflict with any decisions of this court or any other Circuit Court of Appeals." (Respondents' Brief at p. 12). This is incorrect. The decisions below directly contradict the holdings by other Circuit Courts of Appeals on the duty of employers to provide equal seniority rights and to provide reasonable accommodations for qualified employees with disabilities under the Rehabilitation Act.

In addition, the respondents argue that they did not discriminate against Ms. Realbuto because she was a "non-competitive §55-b employee, [and] enjoyed different retention rights . . . than are enjoyed by competitive class employees." (Respondents' Brief at p. 10). However, the apparent facial neutrality of her non-competitive classification cannot disguise the fact that this differential treatment was based on disability. Section 504 does not permit the respondents to deprive a disabled employee of seniority rights because she initially obtained her position pursuant to a program designed to foster the employment of qualified individuals with disabilities.

I. The conflict over the duty to provide equal seniority rights.

The respondents argue that the decisions below do not "conflict with the decisions of the DC Circuit in the cases of *Shirey v. Devine*, 670 F.2d 1188 (D.C. Cir. 1982), and *Allen v. Heckler*, 780 F.2d 64 (D.C. Cir. 1985)." (Respondents' Brief at p. 12). This is wrong.

In fact, the decisions below rejected the majority opinions in *Shirey* and *Allen*. The District Court noted that ". . . Ms. Realbuto relies primarily on two decisions of the Court of Appeals for the District of Columbia resolving an analogous Rehabilitation Act challenge in the federal civil service 'competitive' and 'excepted' classes." (A16). The District Court conceded that the majority opinions in *Shirey* and *Allen* favor Ms. Realbuto, but it found the dissenting opinions "more persuasive." (A18) The District Court expressly decided to take a position "contrary to the majority's statements in *Allen* and *Shirey*." (A19) Furthermore, the Second Circuit considered Ms. Realbuto's argument that *Shirey* and *Allen* conflicted with the District Court opinion, and found it to be "without merit." (A8)

While the District Court could not distinguish *Allen* and *Shirey*, the respondents attempt to do so on the ground that those cases were brought under Section 501 of the Rehabilitation Act,

29 U.S.C. §791, while Ms. Realbuto's case was brought under Section 504.[1] Section 501 prohibits discrimination in employment by the Federal government. 29 C.F.R. §1614.701(a). Section 504 prohibits discrimination in employment by recipients of federal financial assistance. The standards for analyzing a discrimination complaint are substantively identical under Sections 501 and 504.[2]

Unlike Section 504, Section 501(b) also requires each federal agency to submit an "affirmative action program plan for the hiring, placement, and advancement of handicapped individuals." 29 U.S.C. §791(b). However, this obligation was not the basis for the *Shirey* and *Allen* decisions, just as it is not an issue in Ms. Realbuto's case.

Shirey and *Allen* were both brought under the non-discrimination component of Section 501. The plaintiffs in these cases did not challenge the federal government for a failure to establish affirmative action programs. They claimed that the federal government discriminated against them by not granting them rights equal to those of their co-workers who performed the same jobs but were hired after competitive examinations.

In *Shirey*, the court held that "the *unlawful discrimination* in this case occurred when Mr. Shirey was kept in the excepted service long after the reason for keeping him in a separate employment category had expired." 670 F.2d at 1202 (emphasis added). In *Allen*, the court held that ". . . an agency's *duty not*

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[1] The state admits that the "excepted" service in the federal government is analogous to New York's §55-b program and that the facts in *Shirey* were otherwise identical to the present case. Respondents' Brief in Opposition at p. 12, n. 4.

[2] Courts often look to Section 504 case law for guidance in deciding discrimination cases under Section 501. See *McWright v. Alexander*, 982 F.2d 222, 225 (7th Cir. 1992) ("The duty placed on federal agencies by §501 is at least as stringent as that imposed by §504, and we assume that the same anti-discrimination principles apply.")

to discriminate 'at least' means that workers cannot be given fewer benefits solely because of their handicaps . . . It is not enough to treat excepted workers differently, and then justify it by pointing out that there are alternative ways to gain equal treatment." 780 F.2d. 64 at 67, 68. (emphasis added).

Accordingly, this Court should resolve the conflict between the decisions below and *Shirey* and *Allen* on the duties of an employer to provide equal seniority rights to disabled and to non-disabled employees performing the same jobs.

II. The conflict over the duty to provide reasonable accommodations.

The respondents argue that "as the district court in this case correctly pointed out, permitting the petitioner to take advantage of the bumping rights available to employees in the competitive class would constitute a 'substantial' or 'fundamental alteration' in the State's civil service program (A18)." (Respondents' Brief at p. 13.) This is a serious misreading of the District Court decision.

The District Court did not hold that such accommodations would constitute a substantial or fundamental alteration in the state's civil service program. (A18) The respondents made this argument before the District Court, but that court did not follow it. Instead, the District Court found that "the change Ms. Realbuto seeks is not the sort of 'reasonable accommodation' that the statute mandates." (A19) According to the District Court, "reasonable accommodations are those that permit the employee to function as an employee." (A19). Again, the Second Circuit affirmed. (A8)

This limitation on the meaning of reasonable accommodation is contrary to decisions of this Court and other Circuit Courts of Appeals.

As Ms. Realbuto explained in her Petition, this Court has held that the "refusal to modify an existing program might

become unreasonable and discriminatory." *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979) (Petition at p. 18).[3] This Court has also noted the employer's affirmative obligation under Section 504 to make reasonable accommodations by providing "alternative employment opportunities reasonably available under the employer's existing policies." *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 279 n 19. (1987).

Two Circuit Courts of Appeals have specifically rejected the overly narrow approach to reasonable accommodation adopted in the decisions below. In *Buckingham v. U.S.*, 978 F.2d 735 (9th Cir. 1993), the United States Court of Appeals for the Ninth Circuit followed this Court's holding in *Arline* by ruling that a job transfer was a reasonable accommodation under the Rehabilitation Act. The Court held that:

> . . . employers are not relieved of their duty to accommodate when employees are already able to perform the essential functions of the job. Qualified handicapped employees who can perform all job functions may require reasonable accommodation to allow them to (a) enjoy the privileges and benefits of employment equal to those enjoyed by non-handicapped employees . . . In some instances, this may require employees to alter existing policies and procedures that they would not change for non-handicapped employees, but "that is the essence of reasonable accommodation."

978 F.2d at 740 (quoting *McWright v. Alexander*, 982 F.2d 222, 227 (7th Cir. 1992).

In *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992), the District Court found that an employer could only be required to make accommodations "related to [a] specific condition of

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[3] The District of Columbia Circuit held that Mr. Shirey's case presented "just such a situation." 670 F.2d at 1202.

[the employee's] work." *McWright*, 982 F.2d at 227. The Seventh Circuit reversed, holding that the Rehabilitation Act may require modifications in an employer's facially neutral policies. The duty to make reasonable accommodation was not limited to "accommodations that facilitate the performance of specific tasks." *McWright*, 982 F.2d at 227.

Buckingham and *McWright* both stand for the proposition that "reasonable accommodation is not limited to an employee's ability to function on the job." *Buckingham*, 998 F.2d at 741, n. 3. The rationale for the wide range of strategies in making reasonable accommodation for disabled employees is "Congress' express purpose of 'promot[ing] and expand[ing] employment opportunities in the public and private sectors for handicapped individuals.' 29 U.S.C. §701(8)." *Buckingham*, 998 F.2d at 741, n. 3.[4]

The decisions below err in holding that the respondents had no obligation under Section 504 to modify or accommodate its policies and programs so that Ms. Realbuto could obtain seniority rights commensurate with the work she performed. The respondents could have reasonably accommodated Ms. Realbuto, by either converting her to the competitive class at any point after she demonstrated her ability to perform the job, i.e. after her probationary period, or by simply allowing her the same seniority rights as all others in the same position, regardless of classification.[5]

Ms. Realbuto's Senior Administrative Analyst position was competitive initially, she was deemed qualified for the

[4] Furthermore, the *Buckingham* court found nothing in the Rehabilitation Act or its legislative history to "indicate that Congress intended to limit the employer's duty of reasonable accommodation to the facilitation of employment tasks." *Buckingham*, 998 F.2d at 741, n. 3.

[5] The respondents could also have easily accommodated Ms. Realbuto by allowing her to transfer to either of the two vacant Senior Administrative Analyst positions that were available at the time of her termination. Instead, the respondents filled one of the vacant jobs 21 days after Ms. Realbuto's

position, and she performed it successfully for ten years. Taking an exam would have added nothing to her fitness for the job.

The duty of employers to make reasonable accommodation is a fundamental principle under the nondiscrimination provisions of the Rehabilitation Act. The Circuit Courts of Appeals are split on whether this duty is limited to accommodations necessary to allow an employee to perform the essential functions of the job, or whether the duty to make accommodations also applies to employment programs and policies. Accordingly, this Court should resolve this conflict.

III. The duty not to discriminate under Section 504.

The respondents argue that "petitioner's status as a noncompetitive employee was in no sense 'inferior' to the employment status of any other State employee." This argument is based on a faulty premise that Ms. Realbuto was not the victim of discrimination because she "was treated in the same manner as was every other noncompetitive class employee." (Respondents' Brief at p. 10-11).

Senior Administrative Analyst positions in the State of New York are usually competitive positions. When a disabled employee such as Ms. Realbuto is hired through the §55-b program, the respondents initiate a classification change to a non-competitive class, *but the position remains the same in all relevant aspects such as functions, duties and standards.* A §55-b employee is thus placed into a non-competitive class which is unique for the position. This unusual status has profound effects on the employee's seniority rights vis-a-vis others who perform the same work.

In Ms. Realbuto's case, there were literally no other employees with whom she could be compared for seniority purposes. Ms. Realbuto was the *only* Senior Administrative

termination with a public management intern who had only one year of civil service and no experience as a Senior Administrative Analyst.

Analyst with non-competitive status. She did not have seniority rights comparable to Senior Administrative Analysts in the competitive class. Seniority is an inherently relative term; for Ms. Realbuto, her seniority only has meaning when compared to the time-in-service of other Senior Administrative Analysts.

As a practical matter, the respondents created two separate seniority lists, one for the standard Senior Administrative Analyst position and another for Ms. Realbuto, the only disabled §55-b employee in that position. Consequently, the respondents excluded Ms. Realbuto from all meaningful seniority rights. This exclusion from seniority was not a neutral effect of Ms. Realbuto's job classification, but in fact flowed directly from her status as an individual with a disability, and was exactly the type of discrimination which Section 504 prohibits.

The respondents also argue that there was no discrimination in Ms. Realbuto's non-competitive classification because she "obtained her position without competitive testing and "was not forced by her handicap to obtain her position pursuant to §55-b." (Respondents' Brief at p. 10). However, pre-employment tests are simply a means for large employers to determine whether applicants meet the minimum qualifications for a job. In amending the §55-b statute, the New York legislature recognized that standardized testing may be impractical or inaccurate for assessing the qualifications of individuals with disabilities. Memoranda, Ch. 320 McKinney's 1985 Session Laws at 3057. Section 55-b expressly requires the State of New York to make a determination that an individual with a disability is in fact "qualified" for a particular job. The individual assessment of qualifications required by §55-b is a *substitute* for the standard examination process, intended to assure that a testing process does not improperly screen out qualified individuals with disabilities. Both methods are means to the same end - determining the qualifications of applicants.

In 1981, the respondents certified that Ms. Realbuto "met all requirements for performance... of a competitive Senior Administrative Analyst position." Whether Ms. Realbuto took a competitive examination or participated in the §55-b program, the bottom line would have been the same: the State of New York found her to be qualified.

Section 504 and its regulations state that an employer may not classify employees "in any way that adversely affects their opportunities or status because of handicap," 45 C.F.R. §84.11(a)(3), including rights of seniority. 45 C.F.R. §84.11(b).

Ms. Realbuto seeks even-handed treatment from the State of New York. She does not seek preferential treatment, but only the same seniority and retention rights as other employees who performed the same job.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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